NO. 94732-5

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARGARET RUBLEE, Individually and as Personal Representative of the Estate of VERNON D. RUBLEE,

Plaintiff-Petitioner,

v.

PFIZER INC.,

Defendant-Respondent.

RESPONDENT PFIZER INC.'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

This appeal raises a narrow issue of whether Defendant-Respondent Pfizer Inc. ("Pfizer") can be held vicariously liable under the apparent manufacturer doctrine for harm allegedly caused by asbestos-containing products that were manufactured and sold by its former subsidiary, Quigley Company Inc. ("Quigley"). Plaintiff-Appellant Margaret Rublee could have brought direct claims against Quigley for strict liability and claims against Pfizer based on Pfizer's corporate relationship under theories such as successor liability and "piercing the corporate veil." These claims, however, would be subject to a federal injunction, which channels such claims to an asbestos injury bankruptcy trust with nearly $1 billion in funds that were provided largely by Pfizer. In this lawsuit, Mrs. Rublee sought compensation in addition to that provided by the trust by suing Pfizer as an apparent manufacturer. The Court of Appeals correctly held that the doctrine is inapplicable.

The apparent manufacturer doctrine is not designed to determine when a parent may be held liable for its subsidiary's actions. Instead, the doctrine was developed early last century—when sellers generally were subject to different liability standards than manufacturers—to deal with sellers who held themselves out as if they were manufacturers. The doctrine estops such sellers from denying that they are manufacturers and

holds them to the same standards as manufacturers. Until the Quigley bankruptcy trust was formed, no plaintiff had ever attempted to apply the apparent manufacturer doctrine to Pfizer, and every court to consider the issue since, including the Court of Appeals in this case, has rejected application of the doctrine in this context.[1]

The Court of Appeals ruled that Plaintiff's claim failed under every recognized test for apparent manufacturer liability because there was no evidence that Pfizer put itself out as a manufacturer of the Quigley products. In particular, under the objective reliance test—the most widely adopted and, in Pfizer's view, the correct test—it ruled that the labels of the products at issue and other evidence showed that Quigley continued manufacturing the products even after Pfizer acquired it, and that no reasonable purchaser could have believed Pfizer was the manufacturer.

Plaintiff contended in her petition that the Court of Appeals erred in focusing on purchasers rather than ordinary consumers and, indeed, bystanders such as Mr. Rublee. As the Court of Appeals recognized, however, Plaintiff offers no authority for this argument, and no court has

[1] The other courts are *Stein v. Pfizer*, 137 A.3d 279 (Md. Ct. Spec. App. 2016), *cert. denied*, 146 A.3d 476 (Md. Sept. 29, 2016); *Turner v. Lockheed Shipbuilding Co.*, 2013 WL 7144096 (W.D. Wash. Dec. 13, 2013) (applying Washington law), and *Sprague v. Pfizer, Inc.*, 2015 WL 144330, at *3-5 (W.D. Wash. Jan. 12, 2015) (same), *appeal filed*, Jan 5, 2015 (9th Cir.).

ever adopted her proposed rule. Moreover, Plaintiff failed to reconcile her theory with the history and purpose of the apparent manufacturer doctrine, or to offer any coherent reason why the doctrine should be extended to this case. And even if the understanding of bystanders were relevant, undisputed evidence shows that a reasonable bystander would ***not*** have understood Pfizer to be the manufacturer.

In addition, the judgment is supported by an independent, alternative ground not reached by the Court of Appeals: the apparent manufacturer doctrine applies only to sellers and others in the chain of distribution, which Pfizer indisputably was not.

The Court of Appeals' decision should be affirmed.

II. STATEMENT OF THE CASE

In addition to incorporating the facts in the Court of Appeals' June 26, 2016 Opinion, the counterstatement in its Answer to the Petition for Review, and the counterstatement in its Opposition Brief in the Court of Appeals, Pfizer offers the following short summary of relevant facts.

A. Background

From the mid-1930s until 1974, Quigley manufactured and sold Insulag and Panelag, cement-like powders designed to be mixed with water and applied to the surface of areas exposed to extreme heat, both of which contained asbestos. Opinion at 3. In 1968—six years before

Quigley discontinued Insulag and Panelag and replaced them with asbestos-free products—Pfizer acquired Quigley. *Id.*

After the acquisition, Quigley continued to operate as a separate corporation and to manufacture Insulag and Panelag. *Id.* Quigley also continued to handle sales and distribution, and Quigley employees "continued to communicate with purchasers and distributors on Quigley stationery and sign letters on behalf of Quigley." *Id.* Purchasers also "continued to send orders and letters to 'Quigley Company, Inc.'" *Id.*

Quigley forms as well as safety and promotional materials identified Insulag and Panelag as Quigley products. Opinion at 4. And the labels on these products identified Quigley as the manufacturer and Pfizer as its parent. *Id.* at 3-4. For example, the Panelag label stated:

CP 567; *see also* CP 1821, 1824.

B. The Trial Court Proceedings

In September 2014, Vernon Rublee (who later passed away) and his wife Margaret Rublee sued Pfizer and several other defendants alleging that Mr. Rublee suffered from mesothelioma caused by exposure to asbestos products while working as a machinist at the Puget Sound Naval Shipyard ("PSNS") from 1965 to 2005. Opinion at 4 & n.8. The Rublees brought negligence and strict liability claims against most of the defendants, but sued Pfizer under the apparent manufacturer doctrine. *Id.*

At the close of discovery, Pfizer moved for summary judgment. The trial court granted Pfizer's motion, ruling that Plaintiff had failed to raise a genuine issue as to whether Pfizer was an apparent manufacturer because "Quigley was clearly and accurately identified as a/the real manufacturer," and "a reasonable purchaser would not have been induced to believe that" Pfizer manufactured Insulag or Panelag. CP 2929.

C. The Appeal

On appeal, a three-judge panel, comprised of Judges Leach, Cox and Becker, unanimously affirmed. Assuming that this Court would apply § 400 of the Restatement (Second) of Torts and recognize the apparent manufacturer doctrine, the Court of Appeals held that Plaintiff had not

raised a genuine issue about Pfizer's liability under any of the previously recognized tests for apparent manufacturer liability. Opinion at 8-20.

First, the panel found no genuine issue under the "objective reliance" test, which a majority of the courts applying the doctrine utilize. *Id.* at 8-15. This test requires plaintiffs to demonstrate that a "reasonable purchaser, in the position of the actual purchaser," would have thought that the defendant manufactured the product in question. *Id.* at 8-9. After carefully evaluating all the evidence proffered by Plaintiff—including Mr. Rublee's testimony and that of his co-workers—the panel concluded that "no reasonable industrial purchaser could infer from [the evidence] that Pfizer actually manufactured [Insulag and Panelag]." *Id.* at 13.

Second, the panel ruled that Plaintiff's claim fails under the "actual reliance" test, which asks whether the purchaser actually and reasonably relied on the defendant's trademark, reputation, or assurances of quality, because Plaintiff failed to present any evidence that "actual purchasers relied on Pfizer's apparent role." *Id.* at 16-17

Third, the panel found no genuine issue under the "enterprise liability" test. *Id.* at 17-20. Under this test, a plaintiff must establish that, in addition to placing its trademark on the product, the defendant "participate[d] substantially in the design, manufacture, or distribution of the defective product." *Id.* at 17 (internal quotation marks omitted).

Because Plaintiff "presented no evidence" that Pfizer participated in the design, manufacture or distribution of Insulag and Panelag, the panel ruled that there was no genuine issue under this test either. *Id.* at 19-20.

The panel also rejected Plaintiff's argument that Pfizer was liable under § 400 because its trademark was affixed to some Quigley materials. *Id.* at 20-22. This theory, the panel observed, applies only to a licensor who sells or distributes the product, and Pfizer was not a licensor and did not sell or distribute Quigley products. *Id.* at 20-22 (citing Restatement (Third) of Torts: Prods. Liab. § 14 cmt. *d*).

III. ARGUMENT

In her petition for review, Plaintiff did not challenge the Court of Appeals' ruling that she failed to satisfy the actual reliance and enterprise liability tests (and, indeed, criticized the Court for even considering the latter test). Pet. at 15. Instead, Plaintiff criticizes the Court of Appeals' application of the objective reliance test for focusing on purchasers rather than what she calls "ordinary consumers." *Id.* at 13-17. Plaintiff, however, does not even begin to explain why the apparent manufacturer doctrine, which determines when a party should be subject to the rules governing manufacturer liability, should turn on the perceptions of non-purchasers. Plaintiff's contention that the doctrine should apply to parties that do not sell or distribute a product, *id.* at 16, is equally unavailing.

A. The Panel Correctly Ruled That Pfizer Was Not an Apparent Manufacturer of Quigley Products Because a Reasonable Purchaser Would Not Have Believed That Pfizer Manufactured the Products in Question

Citing cases governing the scope of a manufacturer's liability under strict liability, Plaintiff argues that the apparent manufacturer doctrine should turn on the expectations of ordinary consumers. But Plaintiff does not—and cannot—explain why those cases should govern the threshold issue examined by the apparent manufacturer doctrine, namely, when a party that is ***not*** a manufacturer should be subject to the rules governing liability for manufacturers.

1. Under the Objective Reliance Test, a Party Holds Itself Out as a Manufacturer If Its Actions Would Lead Reasonable Purchasers to Believe It Is the Manufacturer

The "apparent manufacturer" doctrine developed in the early twentieth century before the adoption of strict liability when sellers and distributors were subject to more lenient liability rules than manufacturers. *See Hebel v. Sherman Equip.*, 442 N.E.2d 199, 201-203 (Ill. 1982).[2] Under this doctrine, "[o]ne who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were

[2] For example, "while an actual manufacturer of a chattel had a duty to warn potential users of any danger that might arise from its intended use, a non-manufacturing seller or distributor of that chattel generally did not." *Stein*, 137 A.3d at 288 (internal citations omitted).

its manufacturer." Restatement (Second) of Torts § 400 (1965). The doctrine is "a species of estoppel": it estops a seller that holds itself out as a product's manufacturer and invites customers "to buy the product in reliance on the vendor's reputation and care in making it" from denying it is the manufacturer for purposes of liability. *Hebel*, 442 N.E.2d at 201.

To determine if a vendor puts a product out "as its own" product, "the majority of courts . . . have applied the objective reliance test." Opinion at 8; *accord Stein*, 137 A.3d at 294-95. Under this test, a defendant puts a product out as his own "if the advertising was such as to lead a reasonable purchaser to believe that the defendant, and not some other party, was the actual manufacturer." *Hebel*, 442 N.E.2d at 204.

The objective reliance test is applied "from the viewpoint of the purchasing public, and in light of circumstances as of the time of purchase," even where the plaintiff is not the purchaser. *Hebel*, 442 N.E.2d at 203; *see also Heinrich v. Master Craft Eng'g, Inc.*, 131 F. Supp. 3d 1137, 1160 (D. Colo. 2015) (applying the apparent manufacturer doctrine "***through the lens of the reasonable purchaser***") (emphasis added). This focus is consistent with the apparent manufacturer doctrine's purpose, which is to estop a seller from taking advantage of more lenient liability standards where the seller has led the purchaser to believe that it manufactured the product. *See Hebel*, 442 N.E.2d at 203.

Because the doctrine "'was developed in the context of suits by consumers against sellers of dangerous chattels . . . [nearly all the cases imposing liability on this basis involved] defendants who were retailers or distributors.'" *Stein*, 137 A.3d at 294-95 (quoting *Hebel*, 442 N.E. 2d at 202; alterations in the original). As the *Stein* court observed, the present cases against Pfizer are different because they deal "with the purchase of a defective product by a commercial entity and not by a consumer." *Id.* The rule, however, is the same: to prevail on an apparent manufacturer claim, the plaintiff has to show that the reasonable purchaser would have believed it was buying a product manufactured by the defendant. *Id.*

2. The Court of Appeals Correctly Applied the Objective Reliance Test in Finding That No Reasonable Purchaser Would Have Believed That Pfizer Manufactured Insulag and Panelag

The Court of Appeals correctly found that, based on the evidence in the record, no reasonable purchaser of Insulag and Panelag would have believed that Pfizer manufactured the products. As the Court recognized, Quigley expressly identified itself as the manufacturer of Insulag and Panelag, and Pfizer as its parent on the products' labels, which stated:

Manufactured By
QUIGLEY COMPANY, INCORPORATED
Subsidiary of Chas. Pfizer & Co., Inc.

CP 567, 1821, 1824 (emphasis in original). After it was purchased by Pfizer, Quigley continued to sell the products as its own, corresponded

with purchasers on Quigley letterhead, and its distributors sent purchase orders only to Quigley. CP 1806, 1828. In addition, advertisements, marketing bulletins, and material safety data sheets all identified Quigley as the manufacturer. Opinion at 11; CP 1809, 1811, 2360. In light of these repeated statements that Quigley continued to manufacture Insulag and Panelag, the Court of Appeals found that no reasonable purchaser would have believed Pfizer was the manufacturer of the Quigley products based on the evidence presented by Plaintiff. Opinion at 11-15.

Other courts considering whether Pfizer held itself out as the manufacturer of Insulag and Panelag reached the same conclusion. *Stein*, 137 A.3d at 296-97 ("[N]o reasonable fact finder could conclude that a reasonable person, in the position of a Bethlehem Steel purchasing manager . . . could have purchased Insulag in reliance upon Pfizer's reputation and assurances of quality."); *Sprague*, 2015 WL 144330, at *5 ("Aside from establishing that there was a relationship between Quigley and Pfizer, review of the record leads the undersigned to conclude that there is no evidence that Pfizer 'put out' the product[s] at issue here [as its own]."); *Turner*, 2013 WL 7144096, at *3 ("Reviewing each of these items individually and as a whole, the Court concludes that the evidence presented by Plaintiffs demonstrates a relationship between Pfizer and Quigley, but does not suggest that Pfizer manufactured Insulag.").

3. The Court of Appeals' Ruling Is Consistent With Washington Products Liability Law

Plaintiff did not contend in the Court of Appeals or in its petition for review that a reasonable purchaser of Insulag and Panelag—such as the Naval procurement officers who had been buying these products for years—would have believed that Pfizer manufactured them. Instead, Plaintiff argued that the Court of Appeals should have focused on the understanding of end users and, indeed, of individuals such as Mr. Rublee who did not use Insulag or Panelag but were nonetheless exposed to it as bystanders. As the Court of Appeals recognized, Plaintiff cannot cite any case from any jurisdiction applying the apparent manufacturer doctrine in this fashion. Opinion at 9. Nor does she make any attempt to reconcile her position with the history and purpose of the doctrine.[3] Instead, she asserts that the uniform focus of prior opinions on purchasers is incompatible with various aspects of Washington products liability law. Pet. at 13-16. The aspects of these cases that Plaintiff cites do not help her

[3] In response to the AFL-CIO's amicus brief, Plaintiff asserted for the first time that focusing on reasonable purchasers "would permit defendants to profit by associating their brand identity with an injurious product while avoiding liability by funneling their products through a sophisticated industrial purchaser." Reply at 5. This argument makes no sense. Insulag and Panelag were industrial products that were only sold to industrial purchasers, and there is no evidence in the record that Pfizer or Quigley profited in any way by associating the Pfizer brand with the products, which purchasers understood were manufactured by Quigley.

because they have nothing to do with the question of whether non-manufacturers should be treated as manufacturers.

For example, Plaintiff argues that the panel's application of the objective reliance test is inconsistent with the "consumer expectation" test. But the consumer expectation test is one of two tests to determine whether a product is defectively designed. *Seattle-First Nat. Bank v. Tabert*, 86 Wn.2d 145, 154, 542 P.2d 774, 779 (1975) (manufacturer can be held strictly liable if product is "unsafe to an extent beyond that which would be reasonably contemplated by the ordinary consumer"). Applied to this case, that test could determine whether the Quigley products are defectively designed such that the manufacturer, *i.e.*, Quigley, could be held strictly liable for them. But it does not answer the question before this Court, namely whether Pfizer can be held liable as the manufacturer under § 400.

Plaintiff likewise cites cases that extend a manufacturer's liability to "all whom a manufacturer should reasonably expect to use its products," including bystanders. Reply at 6 (citing *Bich. v. Gen. Elec. Co.*, 27 Wn.App. 25, 614 P.2d 1323 (1980); *Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987); *Lunsford v. Saberhagen Holdings, Inc.*, 109 Wn.2d 235, 744 P.2d 605 (1987)). But the fact that a ***manufacturer*** can be held liable for injuries to remote plaintiffs, such as a

bystander, sheds no light on whether and when a non-manufacturer can be treated as a manufacturer.

Plaintiff also contends that the panel's opinion should be reversed because of the "uniform rejection of the sophisticated user defense by Washington courts." Reply at 5. This statement is wrong and inapposite. Washington courts ***have*** recognized the sophisticated purchaser doctrine in appropriate circumstances.[4] Even more important, the sophisticated user defense deals with a separate element of a product liability claim—the manufacturer's duty to warn. Under that doctrine, a manufacturer, like Quigley, discharges its duty to warn end-users about a product danger when the purchaser—usually an employer—knows about the danger and can be expected to warn its employees. It has nothing to do with whether a non-manufacturer, like Pfizer, can be held vicariously liable for harm caused by a product manufactured by another company.

Finally, Plaintiff claims the Court of Appeals erred by requiring individual reliance as an element of an apparent manufacturer claim.

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[4] *See, e.g.*, *Little v. PPG Indus., Inc.*, 19 Wn.App. 812, 824, 579 P.2d 940, 948 (1978) ("[T]he doctrine is particularly appropriate where, as here, the 'intermediate buyer' is a large industrial concern, with its own safety programs and methods of distribution of the product, and where the manufacturer may have no effective means of communicating its warnings to the ultimate user."), *modified*, 92 Wn.2d 118, 594 P.2d 911 (1979); *accord Reed v. Pennwalt Corp.*, 22 Wn.App. 718, 723-24, 591 P.2d 478, 481-82 (1979), *aff'd*, 93 Wn.2d 5, 604 P.2d 164 (1979).

Reply at 8-9. The objective reliance test, however, does ***not*** require individual reliance. Contrary to Plaintiff's assertions, it is wholly compatible with the standards under the Washington Consumer Protection Act, which likewise asks whether an advertisement "has a capacity to deceive a substantial portion of the public." *Mellon v. Reg'l Tr. Servs. Corp.*, 182 Wn.App. 476, 489, 334 P.3d 1120, 1126 (2014).

In sum, Plaintiff has not, and cannot, show that the objective reliance test is inconsistent with Washington law.

4. Even If the Understanding of Bystanders Were Somehow Relevant, Plaintiff's Claim Still Fails

Even if the apparent manufacturer doctrine could be applied based on the understanding of a bystander such as Mr. Rublee, who did not purchase or use the product, the doctrine would still be inapplicable here because, as shown above, the labels for Insulag and Panelag clearly identified the products as "Manufactured by **QUIGLEY COMPANY INCORPORATED**," and stated that Quigley is a "Subsidiary of Chas. Pfizer & Co., Inc." CP 567, 1821, 1824.

Far from contradicting this evidence, the bystander testimony presented by Plaintiff confirmed it. For example, one worker at the Naval Shipyard, Robert Cummings, recalled that Insulag came in bags marked "made by Quigley Company in New York." CP 204. Similarly, Mr. Rublee's co-worker Charles Edwards testified that "Piefer (sic) was on

the bag. . . [i]n small letters towards the bottom," and that there were other company names on the labels as well. CP 879. Even more important, when shown a photograph of the Panelag label stating it was manufactured by Quigley, he testified that the Panelag bags he saw "looked like" the photograph. CP 880. Mr. Rublee's testimony was consistent: he testified that Pfizer's name appeared on the bag, along with "other writing on the bag" that he could not recall. CP 868 ("There was some other writing on there, but I don't know what it was."). Thus, there is no evidence a reasonable person in Mr. Rublee's position would have thought that Pfizer manufactured Insulag and Panelag.[5]

Unable to dispute that the packaging for Insulag and Panelag clearly identified Quigley as the manufacturer and Pfizer as the corporate parent, Plaintiff points to promotional materials, technical data sheets, correspondence with purchasers, and calendars distributed by salesmen containing the Pfizer logo as well as Pfizer annual reports. Pet. at 3-4. Plaintiff, however, failed to offer any evidence that Mr. Rublee or a reasonable bystander would have seen those materials. And she does not—and cannot—explain how these materials would have led a purchaser

[5] Plaintiff attempts to minimize the dispositive impact of the photograph of the Panelag bag by arguing that it is undated. But the photo's date and authenticity were never raised before the trial court, and therefore cannot be challenged on appeal. *See Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844, 847 (2005).

or an end-user to believe Pfizer was the manufacturer of Insulag and Panelag in the face of the products' label and the fact that these other materials likewise identified Quigley as the manufacturer and Pfizer as the corporate parent. CP 963, 965-66, 975, 977, 1809, 1811.[6]

Plaintiff also argued in her petition for review that, under comment *d* to Section 400 of the Restatement (Second) of Torts, Pfizer is subject to the apparent manufacturer doctrine merely because the Insulag and Panelag labels contained the Pfizer trademark. Pet. at 16. This argument, however, is based on a misleading quotation. Plaintiff asserts that, under Section 400, the apparent manufacturer doctrine applies

> where the apparent and actual manufacturer are both identified in a manner, but "the casual reader … overlook[s] the qualification of the description of the source."

Pet. at 16 (quoting Restatement (Second) of Torts § 400, cmt. *d*). In fact, what the Restatement says is quite different:

> The mere fact that goods are marked with such additional words as "made for" the seller, or describe him as a distributor, particularly in the absence of a clear and distinctive designation of the real manufacturer or packer, is not sufficient to make inapplicable the rule stated in this Section. The casual reader ***of a label is likely to rely upon the featured name, trade name, or trademark,*** and overlook the qualification of the description of source.

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[6] The trial court and the Court of Appeals properly concluded that the proffered affidavit of Plaintiff's "branding expert," Steff Geissbuhler, was of no evidentiary value because he was unfamiliar with ***any*** relevant facts and issues. Opinion at 14; *see also* Pfizer Br. at 31-33.

Restatement (Second) of Torts § 400, cmt. *d* (emphasis added). Here, however, the Panelag and Insulag labels did not say that the products were "made for" Pfizer, and Pfizer was not the "featured name" on the label. To the contrary, as shown above, the name in bold, enlarged fonts on the label was "**QUIGLEY COMPANY INCORPORATED**," and the label clearly identified Quigley as the manufacturer and Pfizer as its parent. Opinion at 8, 18-19. It should come as no surprise then that the Maryland Court of Special Appeals rejected the suggestion that Pfizer can be subject to liability under the apparent manufacturer doctrine merely because its logo appears on various documents. *See Stein*, 137 A.3d at 298.

B. In the Alternative, Summary Judgment Was Warranted Because Pfizer Did Not Sell or Distribute Insulag or Panelag

Plaintiff's apparent manufacturer claim also fails for an independently dispositive reason not reached by the Court of Appeals: the apparent manufacturer doctrine applies only to parties that sell or distribute the product in question. Pfizer neither sold nor distributed the Quigley products; this provides alternative grounds for affirming the panel's decision.[7]

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[7] *See, e.g.*, *Turner*, 2013 WL 7144096, at *2 ("By its plain language, § 400 is applicable only to one who 'puts out a chattel,' explained in the comments as one who supplies it to others. . . . An actor who allows his name or trademark to be placed upon a product, but plays

"[T]he overwhelming majority of the opinions reject[] application of apparent manufacturer liability to a trademark owner not in the chain of distribution." *Yoder v. Honeywell Inc.*, 104 F.3d 1215, 1224 (10th Cir. 1997).[8] The Second Restatement implicitly reflects that limitation: Section 400 is titled "***Selling*** as Own Product Chattel Made by Another," Restatement (Second) of Torts § 400, and it applies only to one who "puts out" a product, which the comments explain means "anyone who ***supplies it to others***." *Id.* cmt. *a* (emphasis added).

Plaintiff contended below that it would be "anomalous" if the doctrine applied only to sellers because sellers are already strictly liable under § 402A. Reply at 20. This contention is belied by the history and purpose of the apparent manufacturer doctrine. As explained above, the doctrine developed before strict liability when sellers were subject to more lenient rules than manufacturers, and its primary purpose was to estop sellers who acted as if they were manufacturers from invoking the rules governing sellers. *See supra* at 8-9. Thus, it is well-recognized that, in

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no role in the distribution or supply of that product, does not 'put out' the product and therefore does not fall within the scope of § 400."); *accord Sprague*, 2015 WL 144330, at *5.

[8] *See also Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1236 (9th Cir. 1989) (doctrine applies "only [to] a retailer or distributor"); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1463 (2d Cir. 1995) ("[N]o New York court has ever extended liability under the doctrine to anyone other than sellers of products manufactured by third parties.").

states that have adopted strict liability for sellers and manufacturers, the apparent manufacturer doctrine "is of little practical significance." Restatement (Third) of Torts: Prod. Liab. § 14 cmts. *a* & *b* (1998).

The Washington Products Liability Act ("WPLA") does not suggest otherwise. Although the Act did away with most strict liability for sellers and reintroduced the apparent manufacturer doctrine, RCW 7.72.040(2)(e); RCW 7.72.010(2), its legislative history makes it clear that the doctrine focuses on sellers. It states that, where "a non-manufacturing ***product seller*** . . . adopts the product as its own, the non-manufacturing ***product seller*** . . . should be subject to a manufacturer's liability." Senate Journal, 47th Leg., Reg. Sess., at 625 (Wn. 1981) (emphasis added). The Court of Appeals similarly has recognized that the WPLA allows plaintiffs injured by defectively manufactured products to recover "from ***the product seller*** where ***the seller branded the product as its own***." *Johnson v. Recreational Equip., Inc.*, 159 Wn.App. 939, 946-47, 247 P.3d 18, 22 (2011) (emphasis added).

Thus the undisputed fact that Pfizer did not sell or distribute either Insulag or Panelag provides an independent ground for affirmance.

IV. CONCLUSION

For these reasons and the reasons outlined in Pfizer's principal briefs, the Court of Appeals' decision should be affirmed.

DATED: September 26, 2017

Respectfully submitted,

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DECLARATION OF SERVICE

I, Cynthia Daniel, hereby certify as follows:
I am employed in the County of King, State of Washington, I am over the age of 18 and not a party to the within action. My business and place of employment is Betts Patterson & Mines, 701 Pike Street, Suite 1400, Seattle, Washington, 98101.
On the date set forth below, I served the foregoing document on the interested parties in this action via email addressed as follows:

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DATED this 26th day of January, 2018 at Seattle, Washington.

/s/ Cynthia Daniel
Cynthia Daniel

BETTS, PATTERSON & MINES, P.S.

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